

Federal Communications Commission

FCC 97-199

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of)	
)	
Radio Ingstad Minnesota, Inc.)	
)	
For License to Cover Changes in)	File No. BLH-930310KC
the Facilities of Station KMFX(FM),)	
Lake City, Minnesota)	
)	
Petition for Reconsideration)	

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1997

Released: June 17, 1997

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed by Olmsted County Broadcasting Co. and United Audio Corp. ("Petitioners") on August 19, 1996. Petitioners challenge the Commission's Memorandum Opinion and Order in Radio Ingstad Minnesota, Inc., 11 FCC Rcd 8961 (1996) ("Order"), which denied their Application for Review of the grant of an application by Radio Ingstad Minnesota, Inc. ("Ingstad") for a license to cover construction permit and dismissal of their "Motion to Deny License" ("Motion"). For the reasons stated below, we deny the Petition.

2. Background. Ingstad was granted a construction permit for station KMFX on April 30, 1992. After completing construction of the authorized facilities, Ingstad filed the above-referenced license application. Petitioners, who did not oppose Ingstad's construction permit request, filed the Motion to deny the license application on the ground that, due to intervening terrain conditions, KMFX allegedly failed to provide the 70 dBu coverage required by 47 C.F.R. § 73.315 to its community of license, Lake City, Minnesota. Petitioners relied on terrain profile graphs and an independent engineering study based upon Technical Note 101 coverage prediction methods. See P.L. Rice, A.G. Longley, K.A. Norton, and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communication Circuits," NBS Technical Note 101, first published in 1965 by the National Bureau of Standards. In opposition, Ingstad submitted a supplemental showing¹ that Petitioners' study was flawed and that, properly applied, Technical Note 101 methods predicted satisfactory coverage. Thereafter, Petitioners

¹ In support of its permit request, Ingstad submitted undisputed evidence demonstrating that, based upon 47 C.F.R. § 73.313 standard prediction methodology, KMFX provided the requisite coverage.

submitted another study utilizing different calculations also based upon Technical Note 101.²

3. The Mass Media Bureau ("Bureau") dismissed Petitioners' Motion as an untimely objection to the grant of Ingstad's construction permit. Letter to Radio Ingstad Minnesota, Inc. from the Chief, Audio Services Division, Mass Media Bureau, April 24, 1995 (reference 1800B3-DEB/DJF/JR). Even considered as an informal objection to the license application, the Bureau concluded, the Motion did not demonstrate that issuance of the license would be contrary to the public interest. The Bureau noted that at this latter stage of the station authorization process, Ingstad had a protected interest in grant of its application, "different from and superior to that of a construction permit applicant." Id. It also reasoned that Ingstad's showing that KMFY provided the requisite 70 dBu coverage to Lake City based upon 47 C.F.R. § 73.313 standard prediction methodology was sufficient, in and of itself, to comply with Commission rules. Petitioners sought review of this action on May 24, 1995.

4. In denying Petitioners' Application for Review, we upheld the Bureau's dismissal of the Motion, as well as its determination that issuance of the license would not be contrary to the public interest. We found that Petitioners' arguments were procedurally improper because they could and should have been raised during the initial construction permit stage of the authorization process, rather than the licensing stage. In addition, we held that Petitioners failed to raise facts that "clearly point[ed] to an injury to the public sufficient to outweigh considerations of administrative orderliness." Order at 8963-64. In so holding, we relied upon Ingstad's undisputed showing that KMFY provided the requisite coverage based upon standard prediction methodology. We also stated that, based upon our evaluation of Petitioners' studies, as well as our independent terrain analysis, Petitioners failed to show sufficient deviation from the 70 dBu coverage level to warrant overturning the previous grant of Ingstad's permit. Specifically, we noted that our study indicated that, inter alia, KMFY's median predicted signal strength to Lake City based upon alternative prediction methods would be less than 1 dBu below the required 70 dBu.

5. Petitioners now challenge our reliance on our own "study" in the Order without incorporating it into the record and allowing adversarial comment thereon.³ This challenge is founded on the contention that, absent disclosure of the study, our action is "arbitrary" because the only evidence of record concerning coverage is Petitioners' second engineering study, which allegedly contradicts our determination that issuance of Ingstad's license would

² Petitioners now appear to concede that their first study was flawed, for they contend in the Petition for Reconsideration that "[t]he only reliable evidence of record concerning KMFY coverage to Lake City is the supplemental engineering exhibit submitted by Petitioners[.]"

³ Petitioners concede that "it was appropriate for the Commission to evaluate Petitioners' technical showing." Reply to Ingstad's Opposition to Petition for Reconsideration, ¶ 5. Thus, Petitioners object only to our reliance on our independent terrain analysis, not our independent evaluation of Petitioners' studies.

not be contrary to the public interest.⁴

6. Discussion. Initially, we stress the stringent standard of Section 319(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 319(c), by which Petitioners' challenge to Ingstad's license application must be judged. Grant of the application was the second in a two-stage authorization process governed by Sections 309 and 319(c) of the Communications Act of 1934. See Focus Cable of Oakland, Inc., 65 FCC 2d 35, 39-40 (1977). In the first stage, we granted Ingstad's permit request based on our finding under Section 309 that the public interest would be served by operation of KMFY. This finding was based on the evidence submitted by Ingstad in support of its request, and was unchallenged. During the second, 319(c) stage of the process, Ingstad had a protected interest in grant of its license application, and the earlier public interest finding could be overturned only based upon "extraordinary circumstances." Whidbey Broadcasting Service, Inc., 4 FCC Rcd 8726, 8727 (1989). Accordingly, objections that might have been valid if raised by Petitioners at the first stage were no longer necessarily sufficient, particularly if, as we concluded, they could have been raised earlier. See Focus Cable, 65 FCC 2d at 40; KACY, Inc., 30 FCC 2d 648, 650 (1971). Under this standard, Petitioners' challenge fails.

7. The contention upon which Petitioners' challenge is premised-- that there is no record evidence supporting our decision to grant Ingstad's license application-- is without merit. First, our finding is supported by Ingstad's undisputed evidence that, based upon standard prediction methodology, KMFY provides the required 70 dBu coverage to Lake City. See 47 C.F.R. §§ 73.313; 73.315.⁵ This evidence was sufficient, in and of itself, to

⁴ Petitioners cite three cases in support of this contention, each of which is inapposite to this case except to the extent that it generally involves application of the "arbitrary or capricious" standard of review of agency action. See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574-76 (10th Cir. 1994) (setting aside standard that reduced deficiency payments for farmers' wheat crop due to excessively late planting, where agency's administrative record was silent); Bechtel v. F.C.C., 10 F.3d 875 (D.C.Cir. 1993) (setting aside standard that established "integration" preference for licensing applicants who intend to manage and operate proposed station personally, where agency could not establish a sound, documented basis supporting its policy); Central Alabama Broadcasters, Inc., 73 FCC 2d 146 (1979) (setting aside denial of attorney-client privilege where presiding officer did not articulate deficiencies in showing of justification for privilege). In contrast, here, the Commission's decision was based upon the record evidence as furnished by Ingstad, and the Commission's study corroborated that documentation.

⁵ Attempting to discount this evidence, Petitioners point out that 47 C.F.R. § 73.313 standard prediction methodology normally measures only a three-to-sixteen kilometer area, whereas Lake City is over 16 kilometers from KMFY's antenna site. Accordingly, Petitioners contend, the evidence is worthless and cannot support the Commission's action. Section 73.313(d)(1) specifically provides, however, that "[a]t least one radial must include the principal community to be served even though it may be more than 16 kilometers from the antenna site[.]" and examination of Ingstad's construction permit request reveals its compliance with this requirement. Thus, Ingstad's data based upon standard prediction methodology included the relevant terrain between KMFY's

demonstrate compliance with Commission rules, which do not require showings based on alternative prediction methods in order to demonstrate satisfactory coverage; our decision to perform an independent terrain analysis was entirely within our discretion. Id. Second, our finding is supported by record evidence that alternative methods predict little or no deviation from required coverage levels: Ingstad's supplemental showing that, properly applied, Technical Note 101 methods predict satisfactory coverage; and Petitioners' supplemental engineering study, which based on our independent evaluation showed a median signal strength to Lake City less than 1 dBu below the required 70 dBu. Thus, contrary to Petitioners' argument, our independent terrain analysis did not furnish the sole or central basis for our action; rather, it merely corroborated existing record evidence regarding a single factor in our decision. Finally, our finding is supported by the undisputed fact that Petitioners failed to exercise ordinary diligence by coming forward with their objections in a timely manner. See KACY, Inc., 30 FCC 2d at 650. This non-technical fact supports our finding because, as set forth above, the finding was not a de novo public interest determination. Id.

8. Based on the foregoing, we reject Petitioners' challenge of our reliance on our independent terrain analysis without incorporating it into the record and allowing adversarial comment thereon. Petitioners cite no authority for the proposition that the Commission cannot resort to its own expertise under the circumstances presented here without providing for comment and Section 319(c) contains no provision for the adversarial process advocated by Petitioners. See Manhattan Tankers, Inc. v. Dole, 787 F.2d 667, 670-71 (D.C.Cir. 1986) (affected competitor's right to adversarial process in informal adjudicatory proceeding limited by specific statutory and regulatory scheme at issue). In any case, we would reach the same result even without relying on the Commission's study. Nevertheless, in the interest of full disclosure, we hereby append to the instant decision the Commission's study.

8. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Olmsted County Broadcasting Co. and United Audio Corp. on August 19, 1996 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

transmitter site and Lake City.